No. 87-1415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION AND V.B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

Petitioners,

v.

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER AND ADELINE KALLEMYN, Individually and on behalf of all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents, in their opposition, characterize both questions presented in the petition as "fact-bound" challenges to the findings of the district court. Respondents' characterization of the petition is simply wrong. Petitioners seek review in this Court of two important and recurring questions of federal law, which were decided by the court of appeals in a way that in one instance significantly expands and in the other contrasts with the

analyses adopted by this Court and followed by other courts of appeals.

1. It is important to remember that in this case alleging *classwide* disparate treatment of female applicants, petitioners established by undisputed evidence that female applicants, as a class, were slightly more likely to be hired than male applicants. Pet. App. 12a-13a. The court of appeals squarely rejected petitioners' argument that the district court erred in not finding such statistical evidence to be a defense to a claim of classwide discrimination against female applicants. In doing so, the court of appeals relied upon this Court's opinion in *Connecticut* v. *Teal*, 457 U.S. 440 (1982), which held that such "bottom line" statistics are not a defense to an *individual* claim of disparate treatment. Thus, petitioners stated that "[t]he instant case raises the important issue, left undecided in *Teal*, whether the 'bottom line' defense is an 'answer' to a claim of classwide—as opposed to individual—discrimination." Pet. 12.

Respondents attempt to divert attention from the clear question presented by the holding of the court of appeals by mischaracterizing petitioners' argument as a request to have this Court "reweigh" the evidence of classwide discrimination. Opp. 14-15. "All the Eighth Circuit is saying here is that the jury and the judge were entitled to weigh the equal hiring rate statistics along with the other evidence and to reject it as a valid measure of discrimination." Opp. 15. But petitioners do not want the evidence "reweighed." In fact, it is petitioners' clearly stated position that—as a matter of law—the evidence of classwide discrimination should not have been "weighed" at all. By rejecting the "bottom line" defense to classwide claims, the court of appeals has established a legal standard under which the employer's only statistical defense to a classwide disparate treatment claim is to

show that his hiring mirrors gender representation in the community. See Pet. 12.[1]

The fact that the court of appeals decided a significant legal question is implicitly recognized in the respondents' summary of the issues: "[t]he jury and the trial court rejected the [bottom line] defense, as they were entitled to do." Opp. 15. If, as petitioners have argued, this Court's reasoning regarding the use of "bottom line" statistics cannot be properly extended from individual claims of disparate impact (as was the case in *Teal*) to classwide claims of disparate treatment (as was the case here), then the court of appeals erred—as a matter of law—in holding that the trial court was "entitled to" "reject" the defense. Moreover, that holding—that the decision in *Teal* should be extended to reach such a result—represents a substantial development in the analysis of classwide disparate treatment claims under Title VII that warrants review by this Court. See Pet. 12-13.

2. On the second question presented, petitioners argued that the court of appeals impermissibly shifted to employers the burden to produce "direct evidence" of lack of interest or qualifications among women, rather than requiring the district court to analyze the question

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[1] Respondents' mischaracterization of the Petition as seeking review of a "fact-bound" question is belied by their own statements. Respondents argue:

> The Court of Appeals does not extend *Teal* to class actions. Rather, the Court of Appeals discusses Teal only in the context of a review of the substantiality of the evidence in the record . . . .

Opp. 15. In the first place, there is no reason in logic or law that "extend[ing] *Teal* to class actions" and engaging in a review of the "substantiality of the evidence in the record" are mutually exclusive undertakings, as respondents seem to suggest. In fact, respondents' characterization of the court of appeals' holding—that the district court was "entitled" to "reject[]" the bottom line defense (Opp. 15)—is a concession by them that the holding below constituted an extension of *Teal* to class actions.

of statistical disparity on the basis of refined labor pool statistics that take interest and qualifications into account. In effect, the court of appeals affirmed an analysis of statistical disparity under which the court need not determine which definition of the labor pool leads to the proper statistical comparison, but may instead leave the factfinder free to "weigh" without any constraints the competing inferences. Pet. App. 31a. In response to petitioners' argument that the respondents' labor pool was impermissibly broad (because of a failure to take into account interest and qualifications), the court held that petitioners "bore the burden" of producing "direct evidence" on interest and qualifications. As petitioners demonstrated, such a holding conflicts with this Court's analyses of the use of statistical evidence in *Teamsters* v. *United States*, 431 U.S. 324 (1977) and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).

Respondents for their part do not even *mention Hazelwood* and certainly make no serious effort to reconcile this Court's analysis in that case with the reasoning below. Instead, respondents attempt to avoid addressing the issue presented by mischaracterizing the court of appeals' decision in terms of "whether the evidence was sufficient to support the judgment . . . ." Opp. 17. Respondents state: "All the Eighth Circuit held was that as a matter of law, Plaintiffs' . . . evidence was relevant and sufficient to support the court's decision." Opp. 21. If that were the case, then petitioners would not have brought this question before the Court. However, it is clear that the court of appeals did more than merely approve the district court's finding of facts.

The court of appeals' opinion demonstrates that the court undertook the legal analysis described by the petitioners. The court of appeals adopted the respondents' definition of the labor pool, as reflected in its statement that females constituted 48% of the relevant work force.

Pet. App. 12a. In response to the argument that such a labor pool "failed to consider the actual interest of otherwise qualified men and women," (Pet. App. 12a) the court of appeals stated that

> [petitioners] bore the burden of introducing evidence to show that this failure was significant . . . . [Petitioners], however, introduced no direct evidence demonstrating that a lesser interest in highway maintenance work on the part of females accounted for the disparity between the percentage of such positions held by females and the percentage of females in the work force defined by the class.

Pet. App. 12a. Thus, the court of appeals held that (1) respondents' "general population" statistics accurately measured the appropriate work force; (2) petitioners' refined work force statistics failed to satisfy the "burden" of rebutting respondents' statistics; and (3) a lack of interest among the relevant work force may be shown only by "direct evidence" from petitioners.

Instead of offering an alternative explanation of the court of appeals' opinion, or support for the court of appeals' holding, respondents focus exclusively on the opinion of the district court.[2] However, as noted above, the error in the court of appeals' legal analysis has nothing to do with the sufficiency of the evidence.

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[2] See Opp. 16 ("The trial court permitted the [petitioners] to adduce certain statistical evidence . . ."); Opp. 17 ("Since the [district court] explicitly found that [petitioners] discriminated against women in recruitment practices, they rejected the [petitioners'] evidence of lack of interest"); Opp. 18 ("Obviously, the judge and the jury as factfinders did not find the evidence persuasive"); Opp. 19 ("The factfinders . . . were entitled to reject the [petitioners'] claim that [certain workers] should not be included in the definition of the relevant labor pool"). Virtually the only statement relating to the court of appeals is respondents' repeated refrain that the evidence was sufficient under the "clearly erroneous rule." Opp. 17, 18, 19.

Respondents also argue that petitioners "misrepresent" their "refined" labor pool statistics as general population statistics. In fact, petitioners—unlike respondents—describe the court's definition of the supposedly relevant labor pool in detail. See Pet. 5-6 & n.7. Under that "refined" labor pool—which under its "conservative" definition encompassed all females between 18 and 70 years of age with a drivers license (except for managerial, professional, technical and clerical workers)—the court of appeals concluded that "females constituted up to forty-eight percent" of the relevant work force for maintenance workers. Thus, there is no misrepresentation, or error, in the claim that "the definition employed is indistinguishable, *as a practical matter*, from the general population." Pet. 8, n.7 (emphasis added).

Finally, respondents simply are incorrect in their characterization of petitioners' argument. Respondents state that "Petitioners assert that they were '*not permitted*' to rebut Plaintiffs' evidence . . ." Opp. 17. In fact, a complete quotation of the statement at issue shows that petitioners stated that "if employers are *not permitted* to rebut general work force statistics in this manner [*i.e.*, with more refined work force statistics], Title VII effectively imposes liability on all public employers whose work force does not mirror the racial or sexual composition of the general population." Thus, petitioners never complained that their evidence was not admitted; petitioners' argument always has been that their evidence was improperly ignored. That issue is a purely legal question which merits review by this Court.[3]

* * * * *

[3] The existence of the limited "anecdotal" evidence cited by respondents, Opp. 8-11, does not render the issues regarding the statistical evidence unworthy of review. The anecdotal evidence was based primarily on the testimony of the four named plaintiffs, who were not found to have been victims of discrimination. The Eighth Circuit did not find the few remaining instances of dis-

In sum, the court of appeals' reliance on "general population" data, coupled with the rejection of petitioners' more refined work force statistics and "bottom line" defense, deprives Title VII defendants of any meaningful defense to classwide disparate treatment claims where actual hiring does not mirror minority representation in the community. As such, the Eighth Circuit's decision expands the potential liability of employers significantly beyond what Congress intended and what this Court has allowed to date. Review of the decision below is necessary to clarify the proper use of statistical evidence and burdens of proof in Title VII disparate treatment cases alleging sex discrimination in employment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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crimination to be sufficient to support an inference of intentional discrimination against the class. See Pet. 5-6, n.2.